FEB 27 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-658

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN,
Attorney General of the State of Wisconsin,
Intervening Defendant;
Appellants,

v.

PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA;	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
CHARLES WIGINTON;	No. 71-C-352
RICHARD A. MISURELLI and TERRANCE MC CUE;	No. 71-C-316
GO-GO OF RACINE, INC., A Wisconsin Corporation, THEODORE F. WITHERIL, and JEROME J. RUETZ, JR.; and	No. 71-C-317
DAVID H. ROBERS;	No. 71-C-335

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANTS

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February 26, 1973

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Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported as *Misurelli v. City of Racine* (1972), 346 F. Supp. 43, and is included in the appendix to the jurisdictional statement at page 117.

The opinions and temporary restraining orders of the Honorable John W. Reynolds, Judge of the United States District Court for the Eastern District of Wisconsin, entered on October 21, 1971, are reported as *Bruno et al. v. City of Kenosha* (1971), 333 F. Supp. 726, 731, 732, 733, and 735, and are included in the appendix to the jurisdictional statement at pages 102-117.

The decision and order in the Kenosha cases, which adopts the reasoning of the *Misurelli* case, is unreported and is included in the appendix to the jurisdictional statement at pages 129-130.

JURISDICTION

These are actions for declaratory and injunctive relief under the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction is said to be involved under Title 28 U.S.C. §1343 (3). The three-judge court indicates in its decision that if civil rights jurisdiction were not proper each plaintiff could assert the necessary $10,000 controversy requirement of 28 U.S.C. §1331. It is alleged that secs. 176.05 (1) and 176.05 (8) of the Wisconsin Statutes violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The statutory provision conferring jurisdiction on this court to review the judgment by direct appeal is 28 U.S.C. §1253.

Cases sustaining the jurisdiction of the court to hear the appeal are *Goldstein v. Cox* (1970), 396 U.S. 471, 90 S.Ct. 671, 24 L.Ed. 2d 663, and *Wyman v. Rothstein* (1970), 398 U.S. 275, 90 S.Ct. 1582, 26 L.Ed. 2d 218.

CONSTITUTIONAL PROVISION INVOLVED

Article XIV, Section 1, Amendments to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XXI, Section 2, Amendments to the United States Constitution:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

WISCONSIN STATUTES INVOLVED

Section 66.054 (5) (b):

> The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers and retailers for the sale of fermented malt beverages within its respective limits, as herein provided. Said retailers' licenses shall be of 2 classes, to be designated as Classes "A" and "B."

Section 66.054 (5) (c) 1:

> The electors of any city, village or town may, by ballot, at the spring election, determine whether or not Class "B" retail licenses shall be issued for the sale of fermented malt beverages for consumption on or off the premises where sold, or whether or not Class "A" retail licenses shall be issued for the sale of fermented malt beverages for consumption away from the premises

where sold, provided that whenever a number of qualified electors of any city, village or town equal to, or more than, 15% of the number of votes cast therein for governor at the last general election, shall present to the clerk thereof a separate petition on each question, in writing, signed by them, praying that the electors thereof may have submitted to them any such question and shall file such petition with the clerk at least 30 days prior to the first Tuesday of April next succeeding. Within 5 days of the filing of any such petition such clerk shall determine by careful examination the sufficiency or insufficiency thereof and state his findings in a signed certificate dated and attached to such petition, and within 5 days give written notice to the department of justice, at Madison, Wisconsin, that such petition has been filed with him, stating the question to be submitted, the date of filing such petition, the name of the town, its post-office address, village or city, and such clerk after and not until he shall have determined that such petition is sufficient and shall have given the notice to the department of justice as hereinabove set forth, shall forthwith make an order providing that such question shall be so submitted on the first Tuesday of April next succeeding the date of such order. Said petition must be circulated by one or more qualified voters residing in the town, village or city wherein such local option question will be submitted. The preparation of such petition shall be governed as to the use of more than a single sheet of paper, the dates of signatures, the places of residence of signers, and verification thereof, by the provisions of s. 8.15 as far as applicable. No petition shall be circulated prior to 60 days before the date on which it must be filed, and no signature shall be counted unless it has been affixed to such petition and bears date within 60 days prior to the time for the filing thereof. At such election a separate ballot box shall be provided for such ballots. Such ballots shall conform to the provisions of s. 5.64 (2).

Section 66.054 (14):

(a) The action of any city council, village or town board in the granting or revocation of any license, or

the failure of said city council, village or town board to revoke any license for good cause because of the violation of any of the provisions of this section may be reviewed by any court of record in the county in which the application for said license was filed or said license issued, upon application by any applicant, licensee or any citizen of such city, town or village.

(b) The procedure in said review shall be the same as in civil actions instituted in said court. The person desiring such review shall file his pleadings, which shall be served upon the city council, village or town board in the manner provided for service in civil actions by statute, and a copy thereof shall be served upon the licensee. The said city council, village or town board or licensee shall have 20 days within which to file his or their answer to said complaint, and thereupon said matter shall be deemed at issue and hearing may be had before the presiding judge of said court within 5 days, upon due notice served upon the opposing party. The hearing shall be before the presiding judge without a jury. Subpoenas for witnesses shall be issued and their attendance compelled, in accordance with the provisions of statute relating to civil proceedings. The decision of the presiding judge shall be filed within 10 days thereafter, and a copy thereof transmitted to each of the parties, and said decision shall be binding unless appeal be had to the supreme court in the manner provided by statute for appeals in civil actions.

Section 176.05 (1), (5), (8), and (9):

(1) AUTHORITY TO GRANT LICENSES. Each town board, village board and common council may

grant retail licenses, under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. No member of any such town board, village board or common council shall sell directly or indirectly or offer for sale, to any person, firm, or corporation that holds or applies for any such license any bond, material, product, or other matter or thing that may be used by any such licensee or prospective licensee in the carrying on of his or its said business.

(5) * * * Except as provided in sub. (6), all such licenses shall remain in force until July 1 next after the granting thereof, unless sooner revoked; * * *.

(8) ANNUAL LICENSE MEETINGS. All town and village boards and common councils, or the duly authorized committees of such councils, shall meet not later than May 15 of each year and be in session from day to day thereafter, so long as it may be necessary, for the purpose of acting upon such applications for license as may be presented to them on or before April 15, and all applications for license so filed shall be granted, issued or denied not later than June 15 for the ensuing license year, provided that nothing shall prevent any governing body from granting any licenses which are applied for at any other time. As soon as an application has been approved, a duplicate copy thereof shall be forwarded to the secretary of revenue. No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection.

(9) WHERE AND TO WHOM LICENSES NOT GRANTED. No license or permit shall be granted to any person or persons under the age of 18 years for the sale of any such intoxicating liquors, or to any person who is not of good moral character and a full citizen of the United States and of this state and who has not resided in this state continuously for at least one year prior to the date of filing the application; nor shall any such license be granted or issued to any person who has habitually been a petty law offender, or has been convicted of an offense against the laws of this state punishable by imprisonment in the state prison, unless the person so committed has been duly pardoned. The provisions of this subsection shall not apply to a Wisconsin corporation; such provisions apply, however, to all officers and directors of any such corporation.

Section 176.05 (10) (b):

No retail "Class B' liquor license shall be issued to any person who does not have, or to whom is not issued, a Class "B" retailer's license to sell fermented malt beverages under s. 66.054.

Section 176.11:

Upon complaint made in writing under oath by any resident in, and filing with the clerk of, any town, village or city that any such licensed person therein has violated any provision of this chapter or keeps or maintains a disorderly or riotous, indecent or improper house, or that he has sold or given away any intoxicating liquor to any minor, or to persons intoxicated or bordering upon intoxication, or to known habitual drunkards, or that he has not observed and obeyed any order of such supervisors, trustees, aldermen, or county superintendent of the poor, or any of them, made pursuant to law, the proper town board, village board or common council shall

issue a summons, to be signed by the clerk, directed to any peace officer or constable therein, commanding the person so complained of to appear before them on a day and at a place in such summons named, not less than 3 nor more than 10 days from its date, and show cause why his license should not be revoked. Such summons shall be served at least 3 days before the time at which such person is commanded to appear, and may be served either personally or upon the person in charge of the place to which such license relates.

Section 176.12:

If such person shall not appear as required by the summons the complaint shall be taken as true; and if the board shall deem its allegation sufficient the license shall be revoked, and notice thereof shall be given to the person whose license is so revoked; but if such person shall appear and deny the complaint each party may produce witnesses and be heard by counsel. If upon such hearing the board shall find the complaint to be true the license shall be suspended for not less than 10 days nor more than 90 days or revoked, and if untrue the proceeding shall be dismissed without costs to the accused, and if the complaint be found by the board to be malicious and without probable cause the cost shall be paid by the complainant, and the board may require security therefor before issuing the summons as aforesaid. When a license is revoked it shall be so entered of record by the clerk, and no other license shall be granted to such person within 12 months of the date of its revocation nor shall any part of the money paid for any license so revoked be refunded.

QUESTIONS PRESENTED

1. Whether the privilege to renew combination Class "B" fermented malt beverage and intoxicating liquor licenses which expire at the end of a licensing year constitutes "liberty" or "property" within the meaning of the due process clause of the Fourteenth Amendment.

Answered by the three-judge court in the affirmative.

2. If a protected interest can be identified, is a legislative-type hearing coupled with availability of subsequent court review a *meaningful* hearing under the due process clause?

Answered by the three-judge court in the negative.

3. Whether the abstention doctrine should apply to a three-judge court action where the prayer for relief includes the court-ordered issuing of a liquor license and the state remedies have not been exhausted.

Answered by the three-judge court in the negative.

STATEMENT OF THE CASE

Appellees were applicants for renewal of their Class "B" fermented malt beverage and intoxicating liquor licenses which were expiring on July 1, 1971, except Richard A. Misurelli who was applying for the license for the first time, apparently in place of a silent partner, Terrance McCue.

Following the adoption of the Twenty-first Amendment to the United States Constitution the Wisconsin State Legislature directed its attention to the adoption of controls over the subject of the trafficking in intoxicants. Among the major issues resolved by the legislature was the question of whether retailing intoxicants should be a wholly governmental function or whether the private sector should be allowed to take part in the retailing of beer and intoxicating liquors. The legislature determined that the private sector would be allowed to participate in the liquor trade under such restraints and regulations as deemed necessary by the legislature. Those regulations and restraints manifested themselves in ch. 13 of the Laws of 1933, presently found in chs. 66 and 176 of the Wisconsin Statutes, and which may be classified in the field of retail sales as "local option." In other words, each local unit of government, towns, villages and cities, have the authority to determine whether liquor and beer will be sold within the boundaries of their jurisdiction, how many licenses within a state-designated limit will be issued, where such establishments will be located, and who shall receive licenses.

Class "A" licenses are issued for what are commonly called liquor stores selling packaged liquor and beer for consumption off the premises. Class "B" retail liquor licenses are for sale of liquor and beer by the drink on the premises,

commonly known as "bar" or "tavern" licenses. Section 176.05 (10) (b) provides that:

> "No retail 'Class B' liquor license shall be issued to any person who does not have, or to whom is not issued, a Class 'B' retailer's license to sell fermented malt beverages under s. 66.054."

Thus, although a license may be obtained to operate a retail Class "B" beer establishment without having a license to sell intoxicating liquor, the opposite is not true.

The scheme of local licensing set out in the statutes, sec. 176.05 (8), provides that new and renewal licenses must be applied for prior to April 15 of each year and that the town and village boards or common councils of cities must meet not later than May 15 of each year and be in session from day to day thereafter so long as it may be necessary for the purpose of acting upon such applications and shall grant or deny such licenses not later than June 15 for the ensuing license year.

Each license is good for one year or less and is renewed at the option of the licensing body. Each applicant must provide notice in the local newspaper that he is applying for a license, sec. 176.09, Wis. Stats.

Section 176.05 (1) provides that each municipality may "grant retail licenses * * * to such persons * * * as they deem proper." Section 176.05 (9) specifies persons to whom licenses shall not be granted.

At the annual license meetings required by sec. 176.05 (8), Wis. Stats., members of the public and police authorities are heard as to complaints concerning any applicant, and the applicant may if he chooses appear in his own behalf and be

heard concerning his qualifications and desirability as an applicant for a beer or liquor license or a combination license. These "annual license meetings" are conducted by the legislative bodies of the towns, villages and cities in the State of Wisconsin and have been termed "legislative hearings."

If, after the hearing, the legislative body decides not to renew the license of an applicant, sec. 176.05 (8) requires "* * * a statement on the clerk's minutes as to the reasons for such rejection."

The applicant thereafter has two remedies available to test the action of the legislative body in court prior to the ensuing licensing year which begins on July 1 of each year. The first remedy relates solely to the fermented malt beverage license, and this is found in sec. 66.054 (14), Wis. Stats. The action which is brought in the county court in a full-fledged trial on the issues surrounding the denial must be litigated within five days after joinder of issue and decided by the judge within ten days after trial.

The other procedure available to an applicant who has been denied a renewal license which applies to both beer and intoxicating liquor, and would also apply to an original application, is by writ of certiorari in the circuit court of the county.

The appellees, six from the City of Kenosha and three from the City of Racine, are persons engaged in the operation of taverns featuring nude and seminude dancing in those cities. Each of the appellees, between June, 1970, and June, 1971, held a Class "B" combination liquor and beer license duly issued by the appellant cities pursuant to chs. 176 and 66

of the Wisconsin Statutes. Prior to June, 1971, each filed with their city clerks appropriate and timely applications for the renewal of their Class "B" licenses for the license year 1971-1972. Public hearings were held by the city councils of each city, and for the purposes of those hearings the appellees, applicants for renewals, were segregated from the other applicants because, unlike the other applicants, they featured nude entertainment in their bars. During the public hearings they were treated as a group rather than as individuals, and at these hearings residents of the cities were permitted to speak on the subject of the appellees' license renewals. Speakers, including attorneys representing the appellees, spoke both for and against the issuance of licenses. No attempt was made to deny that the applicants featured nude entertainment. No request was made by appellees' attorneys to cross-examine any witness, and witnesses were not sworn under oath. (Jurisdictional Statement, A. 103). The appellees appeared at the hearing and made statements, but a verbatim transcript of the hearing was not made. (Jurisdictional Statement, A. 118).

On June 1, 1971, after holding public hearings, the City Council of Racine, acting on the recommendation of its License and Welfare Committee, refused to renew the licenses of Go-Go of Racine, Inc., and David H. Robers because, among other things, the committee concluded that because of the manner of operation of their business, using nude entertainment, the reputation of the City of Racine was changing to that of a city of "ill repute." It was also concluded that an undesirable element was being attracted to the community which fostered an increase in prostitution, promiscuity, and venereal disease. (Jurisdictional Statement, A. 115).

On the same date the City of Racine refused to issue an initial license to Richard A. Misurelli, apparently a silent partner of Terrance McCue who had held the 1970-1971 license but did not apply for renewal, for the same reasons that Go-Go of Racine, Inc., and David H. Robers were denied renewals.

On June 7, 1971, after holding public hearings, the City of Kenosha denied the renewals of Peter G. Bruno, Bruce Bleashka, Sleepy's, Inc., Fred Kauzrich, and Charles Wiginton because, among other things, the nude dancing helped furnish an atmosphere conducive to the flourishing of prostitution, creating a bad environment, and setting improper moral standards for the children in the community. (Jurisdictional Statement, A. 104).

Appellee Jeanette Stenzel was granted renewal of her license on June 7, 1971. However, on June 21, 1971, the City Council of Kenosha voted to reconsider Stenzel's license, and upon reconsideration voted to deny her a license because she had used nude dancing entertainment in her establishment.

On June 30, 1971, the Honorable John W. Reynolds issued a temporary restraining order which ordered the City of Kenosha to issue retail fermented malt beverage and intoxicating liquor licenses to Bruno, Bleashka, Sleepy's, Inc., and Fred Kauzrich. Subsequently, Judge Reynolds ordered licenses be issued to the other appellees, including Richard A. Misurelli, who had not held a liquor license for the year 1970-1971. (Jurisdictional Statement, A. 112-113).

After the filing of amended complaints on September 21, 1971, which specifically attacked the constitutionality of sec. 176.05 (1) and (8), Wis. Stats., under the due process

clause of the Fourteenth Amendment because the statutes permit denial of license without judicial-type hearing, Judge Reynolds issued memorandum opinions and orders in each of the cases directing that the temporary restraining orders then outstanding in each of the cases would be continued until further order of the court, thus continuing the court-ordered licenses. (Jurisdictional Statement, A. 102-110).

After the convening of a three-judge court, the Governor and the Attorney General of Wisconsin were notified of the pendency of the actions and the Attorney General intervened as a defendant. The parties stipulated to the facts and each moved for summary judgment. In ruling on the motion, the three-judge court found that Racine, acting upon the appellees' applications for renewal of their liquor licenses, except Misurelli who was a first-time applicant, held a public hearing before the City Council Licensing Committee in which all citizens of the community were allowed to make statements for and against the nude dancing activities in the taverns operated or proposed to be operated by the appellees. Citizens expressing their views were not placed under oath and they were not cross-examined. No verbatim transcript was made and none was requested by the appellees. The appellees appeared at the hearing and made statements. Notes were taken by the committee and a written report was filed with the city council recommending that licenses not be issued to Go-Go of Racine, Inc., Richard A. Misurelli, and David H. Robers. (Jurisdictional Statement, A. 114-116). The court found that substantially the same procedure was followed by the City of Kenosha in denying licenses to the other appellees. (Jurisdictional Statement, A. 104-105).

The temporary restraining orders entered by Judge Reynolds on October 21, 1971, protected the licenses of the appellees through the 1971-1972 licensing year and that part of the 1972-1973 licensing year from July 1, 1972, to the August 2, 1972, decision and order of the three-judge court directing the appellant cities to grant Class "B" fermented malt beverage and intoxicating liquor licenses to all of the establishments featuring nude dancing. Judgment was entered on August 14, 1972, and appeal was taken September 1, 1972. Probable jurisdiction was noted on January 8, 1973.

SUMMARY OF ARGUMENT

The three-judge court of the United States District Court for the Eastern District of Wisconsin did not identify the protected interest in liberty or property which it contended the due process clause of the Fourteenth Amendment protects. The court misplaced its reliance on *Constantineau* because there the protected interest was clearly the liberty of the individual to buy liquor unless he fell within a disqualifying provision of the law after a due process hearing.

Just as the professor in *Roth* had no protected interest after the expiration of his one-year employment contract, the holder of a fermented malt beverage and intoxicating liquor license under Wisconsin law has no protected interest after the expiration of the license and this court has never recognized a property interest in such a license.

If there is an identifiable protected interest, a weighing of the governmental interests against the private interest requires a conclusion that a legislative-type hearing where

the applicant and the citizens of the community can inform the licensing body of their relative positions with availability of court review to test arbitrary, capricious, or discriminatory action by the licensing board meets all requirements of fair play and due process.

The federal court should have stayed its hand under the abstention doctrine and allowed the civil action then pending in the Circuit Court of Racine County, in which the appellee Go-Go of Racine, Inc., was challenging the Wisconsin laws, to determine all issues. Federal courts should not interfere with the operation of a statewide system of liquor enforcement and such interference with state policies appears to be in violation of sec. 2 of the Twenty-first Amendment to the United States Constitution.

ARGUMENT

I. The Privilege To Renew A Combination Class "B" Fermented Malt Beverage And Intoxicating Liquor License Which Expires Under Wisconsin Law At The End Of A Licensing Year Does Not Constitute "Liberty" Or "Property" Within The Meaning Of The Due Process Clause Of The Fourteenth Amendment.

A. The three-judge court did not identify protected interest.

This court has indicated clearly in *Board of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548, and *Fuentes v. Shevin* (1972), 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556, that the procedural due process

requirements of the Fourteenth Amendment apply only to the deprivation of interests which fall within the protection of life, liberty and property contained within the amendment.

Liberty has not been defined with exactness by the court, but in *Roth* it was noted that it includes " '* * * freedom from bodily restraint but also the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized * * * as essential to the orderly pursuit of happiness by free men.' Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 626, 67 L.Ed. 1042."

Recently the court construed this liberty to include the right of privacy and permits a woman to decide with her physician whether to have an abortion unregulated by the state during the first few months of pregnancy. *Roe v. Wade* (1973), — U.S. —, 93 S.Ct. 705, 34 L.Ed. 2d —.

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, a protected interest can be identified under the liberty provisions of the Fourteenth Amendment. *Wisconsin v. Constantineau* (1971), 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed. 2d 515. The same interests can be identified where future opportunity for government employment is involved, *Joint Anti-Fascist Refugee Committee v. McGrath* (1951), 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; eligibility for types of professional employment, *Schware v. Board of Bar Examiners* (1957), 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796;

Willner v. Committee on Character & Fitness (1963), 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed. 2d 224; and *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed. 2d 1230.

In *Constantineau,* the case which the three-judge lower court apparently feels significant in establishing herein a protected interest in liberty, the individual was denied the right to purchase liquor without an opportunity to confront the person claiming that his conduct warranted being posted and to present his side of the story before he was in fact "posted." The analogy is misplaced. *Constantineau* dealt with the individual's right to purchase liquor, which was a protected interest which could not be denied without due process. In the instant case, the court has failed to identify what protected interest in liberty is involved, except to say that this court has found such protected interests in occupational licenses. It is clear, however, that a fermented malt beverage and intoxicating liquor license cannot be compared with an occupational license.

Accordingly, it must be concluded that the lower court has not identified a protected interest in liberty under the Fourteenth Amendment requiring the application of the due process clause to this type of license.

This court has given further guidance in *Roth* in regard to protected interests under the Fourteenth Amendment's due process clause which involve property. It is noted that property interests are not created by the constitution,

> "* * *Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. * * *" 92 S.Ct. 2709.

Thus, college professors and staff members who are dismissed during the terms of their contracts have interests in continued employment that are safeguarded by due process. *Wieman v. Updegraff* (1952), 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216. In *Roth* the court also pointed out that it had held in *Connell v. Higginbotham* (1972), 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed. 2d 418, the principle applies to a teacher recently hired without tenure or a formal contract but nonetheless with a clearly implied promise of continued employment.

To identify a property interest in a benefit it is clear that the person must have a legitimate claim of entitlement to it and not just a need, desire, or unilateral expectation of the benefit. Thus, in *Roth* the professor had only the protectable interest to employment up to the expiration of his one-year contract. There was no interest in reemployment for the next year and, therefore, although he had a concern in being rehired which could be classified as abstract, he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

It appears that the property interest rationalized by the lower court was the $20,000 stipulated investment that each plaintiff had in his tavern operations. (Jurisdictional Statement, A. 105). Although this particular monetary figure was found only in the decision of the single judge to continue the temporary restraining order, the decision itself has reference to potential monetary damages which would accrue from the denial of a liquor license and the statement that if jurisdiction were not present under the Civil Rights Act each plaintiff would be able to assert the necessary $10,000 controversy requirement of Title 28 U.S.C. §1331. Apparently the court thus concluded that the liquor license has

a monetary value which could be alleged to establish federal court jurisdiction if necessary. This seems to be a tenuous basis on which to conclude that there is a property interest in the renewal of a fermented malt beverage and intoxicating liquor license within the meaning of the due process clause of the Fourteenth Amendment. We think the lower court erred in this respect.

B. This court has never recognized the refusal to issue or renew a liquor license as denying a property right.

Since *Crowley v. Christensen* (1890), 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620, this court has recognized that refusal to issue or renew a liquor license does not deny a property right. The court said, at 137 U.S. 91:

> "* * * The police power of the State is fully competent to regulate the business — to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. * * * It is a matter of legislative will only. * * *"

In *Lewis v. City of Grand Rapids* (6th Cir., 1966), 356 F. 2d 276, the court said: "The only inescapable rule of *Crowley* is that the denial of a hearing, in itself, would not violate the Fourteenth Amendment."

The court went on, at page 286:

> "* * * The traditional municipal interests in regulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded,

> part-time officials, require the use of flexible procedures. These exigencies of city management must not be disregarded by ordering that plaintiff Lewis, and everyone else wishing to become a transferee of a liquor license, receive a process including '* * * *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.' * * *"

Since the Twenty-first Amendment this court has consistently held that the states possess "* * * broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries* (1944), 324 U.S. 293, 299, 65 S.Ct. 661, 664, 89 L.Ed. 951. *Joseph E. Seagram & Sons v. Hostetter* (1966), 384 U.S. 35, 42, 86 S.Ct. 1254, 16 L.Ed. 2d 336.

In *Goesaert v. Cleary* (1948), 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163, Justice Frankfurter placed in proper perspective the relative interest of the state in establishing a legislative scheme for governing and controlling liquor traffic and the rights expressed under the Fourteenth Amendment, 69 S.Ct. 199:

> "* * * The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and untrammeled of legislative powers [of the state]. * * * The [Federal] Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."

Most recently this court in *California v. LaRue* (1972), — U.S. —, 93 S.Ct. 390, 34 L.Ed. 2d 342, said, at 93 S.Ct. 395:

"While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed. 2d 350 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' Still earlier, the Court stated in State Board v. Young's Market Co., 299 U.S. 59, 64, 57 S.Ct. 77, 79, 81 L.Ed. 38 (1936):

> " 'A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.' "

While this court conceded that the Twenty-first Amendment does not supersede all other constitutional provisions in the area of liquor regulations, leaving room for such recognized protected interests as were identified in *Wisconsin v. Constantineau,* supra, in *LaRue* it did conclude that the Twenty-first Amendment undoubtedly strengthened the case for upholding state regulation of liquor.

The principal case relied on by the three-judge court is *Hornsby v. Allen* (5th Cir., 1964), 326 F. 2d 605. The Wisconsin Supreme Court specifically rejected *Hornsby* in the *Ruffalo* decision. Hornsby brought suit under the Civil Rights Act after being denied a liquor dealer's license. The court said that the licensing power is an adjudicative process and therefore judicial in nature rather than legislative and,

therefore, the due process and equal protection provisions of the Fourteenth Amendment apply in the liquor licensing field. The Hornsby court did not address itself to the question of whether a liquor license is liberty or property within the meaning of the due process clause. Therefore, insofar as the court below relied entirely upon due process requirements, the *Hornsby* case is not persuasive.

Two years after *Hornsby* the due process issue was squarely considered by the Sixth Circuit in *Lewis v. City of Grand Rapids* (6th Cir., 1966), 356 F. 2d 276. Getting directly to the heart of the matter, at page 286, the court quoted the district judge as follows:

> "We recognize that the Michigan Supreme Court and the courts of the other states have held consistently that the due process clause of the United States Constitution does not apply to matters concerning liquor licenses." 222 F. Supp. 384.

On the question of whether a license is property, the court referred to *Scott v. Arcada Township Board* (1934), 268 Mich. 170, 255 N.W. 752, which emphasized the difference between the granting of a license and its revocation, indicating that revocation might indeed require due process. The court pointed out, however, at page 285:

> "* * * Plaintiff Lewis did not own a license to operate a liquor establishment, and the opportunity to seek approval to become an owner was not, in our view, a property right. * * *"

The three-judge court herein, and also the district judge in the *Lewis* case, apparently relied on the decision in *Glicker v. Michigan Liquor Control Commission* (6th Cir., 1947), 160 F. 2d 96, as holding that the licensing board

was required to hold a full-dress adversary hearing before denying approval of a liquor license. However, the *Lewis* appellate court specifically denied such holding in *Glicker* and declined to so hold, page 288. The *Glicker* case held merely that the state under a guise of regulating the liquor business could not deny its citizens equal protection of the law.

The Lewis court said further, at page 289:

> "* * * We recognize some observations in the Hornsby case as being at odds with out conclusion and to that extent we decline to follow it."

In *Atlanta Bowling Center, Inc. v. Allen* (5th Cir., 1968), 389 F. 2d 713, the court sidestepped *Hornsby* and rejected contentions of violation of due process and equal protection where the aldermen and mayor had refused to approve a liquor license for a room at a bowling center, the reasons relating to the location, the nature of the family recreation center, the attraction of minors to an amusement park nearby, and past precedent that liquor licenses were not given to bowling alleys.

Commenting that *Hornsby* is "* * * a case mistakenly thought by too many to be a pledge that if local authorities would not, a Federal Court would, grant a liquor license * * *," p. 714, the court held that the ordinance governing issuance of liquor licenses and emphasizing public interest and welfare and relation of location to other activities, properties and uses gave sufficient notice to applicants that they would be judged on those factors when applying for a liquor license, even though such reasons given when denying application were not expressly articulated in the ordinance.

Accordingly, *Hornsby* is not persuasive because it failed to identify the liberty or property interest which is said

to bring the denial of a retail liquor store license within the due process clause. It is also distinguishable from the instant cases because it appears there was no requirement or opportunity for judicial review.

C. Identifiable protected interests.

The Wisconsin fermented malt beverage license and the combination fermented malt beverage and intoxicating liquor license is issued to the licensee for a period of one year. The Wisconsin Supreme Court has construed the license to be a personal privilege given to the licensee which cannot be the subject of transfer or of contract which would limit or control the discretionary authority of a licensing board. *Smith v. Whitewater* (1947), 251 Wis. 306, 29 N.W. 2d 33; *Smith v. Whitewater* (1947), 251 Wis. 313, 29 N.W. 2d 37; *State v. Bayne* (1898), 100 Wis. 35, 75 N.W. 403.

The Wisconsin license remains in force until July 1 of the next year after the granting of the license unless sooner revoked. The revocation procedure is set out in secs. 176.11 and 176.12, Wis. Stats., and provides for an adequate due process hearing, thus recognizing that while the license is still in force during the one-year period there are protected interests that may not be taken away except by a due process hearing. However, the concept that a liquor license is a continuing property right was rejected by the Wisconsin Supreme Court in two cases decided in 1968, *Marquette Savings & Loan Asso. v. Twin Lakes,* 38 Wis. 2d 310, 156 N.W. 2d 425, and *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 157 N.W. 2d 568.

In the first case, Marquette Savings and Loan Association held a mortgage on certain real estate which included

a tavern, and a provision in the mortgage provided that the tavern license and all fixtures in the tavern were included with the mortgaged premises and provided that the license could not be sold, transferred or surrendered without the consent of the Marquette Savings and Loan Association. When the property was foreclosed and the municipality subsequently reissued the license to the mortgagor, Marquette Savings and Loan Association started suit and claimed a property and contract right in the license because of the agreement between the licensee and the mortgagee.

The Supreme Court of Wisconsin rejected this position, holding that to permit the licensee and a third party to enter into a contract of this sort would negate the discretionary authority of the licensing board in granting and renewing licenses which would be against public policy.

In *State ex rel. Ruffalo v. Common Countil,* the City of Kenosha refused to renew his combination Class "B" fermented malt beverage and intoxicating liquor license although he had held the license for over 18 years. A petition signed by 70 homeowners and residents objecting to the renewal was filed with the city council and after a legislative-type hearing the renewal was denied by the common council. Ruffalo contended that he had a property right to renewal of the liquor license and that the failure to renew was in effect a revocation which should have followed secs. 176.11 and 176.12, Wis. Stats. The court denied Ruffalo's contentions that he was entitled to a trial-type hearing upon his application under the due process clause of the constitution and in doing so refused to follow *Hornsby.* The court said, at 38 Wis. 2d 518, 524, 157 N.W. 2d 568, 571:

> "* * * However, the granting of a liquor license is a legislative function which does not require a trial-type

hearing to comport with due process. From time immemorial, legislators and bodies exercising the legislative function have held the legislative type of hearing wherein one is given notice of the hearing and a fair opportunity to state his position on the issue. The right to a hearing and a record sufficient for judicial review to determine whether the exercise of the administrative power was capricious or arbitrary is fundamental. We pointed out in *Ashwaubenon v. State Highway Comm.* (1962), 17 Wis. 2d 120, 115 N.W. 2d 498, that in those cases where the judicial branch has the jurisdiction to review the action of the legislative function the facts which lie within the knowledge of the agency must be disclosed in the record so that the record is complete and adequate for a judicial review to determine whether the action was arbitrary, capricious or discriminatory. *See Goldsmith v. Board of Tax Appeals* (1926), 270 U.S. 117, 46 Sup. Ct. 215, 70 L.Ed. 494. A legislative type of hearing does not include necessarily the right to cross-examine or require testimony to be given under oath."

The court also held that the licensing body has the same discretion in respect to renewals as it has with respect to granting original licenses, citing *State ex rel. Boroo v. Town Board* (1960), 10 Wis. 2d 153, 102 N.W. 2d 238.

The Wisconsin Supreme Court has repeatedly held that the licensing authority has wide discretion to deny licenses subject to court review as to the question of the refusal being arbitrary, capricious and discriminatory. This discretion has been interpreted to be in addition to specific statutory requirements such as age, good moral character, citizenship, and law violators as provided by sec. 176.05 (9), Wis. Stats., and has included the discretion to refuse to license a tavern in a specific neighborhood, *State ex rel. Higgins v. Racine* (1936), 220 Wis. 107, 264 N.W. 490; refusal

to grant a license based on the number of taverns already in a given area, *Rawn v. City of Superior* (1943), 242 Wis. 632, 9 N.W. 2d 87; and refusal to renew a license where the applicant had failed to reveal a felony conviction in another state on his original application, *State ex rel. Boroo v. Town Board,* supra.

There would seem to be no question that each licensing municipality could decide not to have any licensed fermented malt beverage and intoxicating liquor establishments within municipal boundaries. Would such action raise due process questions concerning the licensee's protected interests in the licenses? We think not. See 48 C.J.S., *Intoxicating Liquors,* §64. Even the lower court seems to concede that any protected interests could be wiped out by the legislative body without a due process hearing. (See Note 26, Jurisdictional Statement, A. 128). It would seem, therefore, that the appellees would have greater standing to raise equal protection issues rather than due process issues. Such an attack would also be fatal because it is conceded that the cities of Racine and Kenosha applied uniform legislative policy to all licensees who featured nude dancing in their establishments and decided not to license those establishments any further.

It must be concluded, therefore, that there are no protected interests within the meaning of the due process clause of the Fourteenth Amendment in a combination fermented malt beverage and intoxicating liquor license under Wisconsin laws after its one-year life.

As in *Roth,* where the University professor's contract expired, here the licensee's contract expires and, although he may have a unilateral expectation of renewal, the state has clearly not given such property interests as are entitled to the protection provided in the due process clause of the Fourteenth Amendment.

II. If There Is An Identifiable Protected Interest In Securing An Original License Or A Renewal License, The Legislative-Type Hearing Coupled With Court Review Is "Meaningful" And "Appropriate To The Nature Of The Case."

A. What process is due?

If it is determined that due process applies to the denial of the renewal or the original application for fermented malt beverage and intoxicating liquor license, there still remains the question as to what process is due.

As this court said recently in *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484, at 92 S.Ct. 2600:

> "* * *It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.' Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed. 2d 1230 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure."

In *Hannah v. Larche* (1960), 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed. 2d 1307, at 80 S.Ct. 1515, this court instructed as follows:

> "* * * Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.* * *"

The real question is what is *fair play* in a given situation. As Mr. Justice Frankfurter said in *Snyder v. Massachusetts* (1934), 291 U.S. 97, 116-117, 54 S.Ct. 330, 78 L.Ed. 674:

> "* * * Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' * * *"

Consideration must be given to the nature of the identifiable interest, the nature of the proceeding and the possible burden on that proceeding as stated in *Larche*. In *Brewer* the court called for a determination of the precise nature of the *governmental function* involved and a weighing of that interest against the *private interest* that is being affected by governmental action.

If, for the sake of argument, we concede an identifiable private interest, it must be in the nature of the "equities" in favor of granting of a renewal license as recognized by the Wisconsin Supreme Court in *Ruffalo,* supra, 157 N.W. 2d 571:

> "* * * Of course, normally in a renewal situation there are more equities in favor of granting the license and the complete disregard of them goes to the question of the refusal being arbitrary, capricious and discriminatory. * * *"

The governmental interest has been repeatedly recognized by this court as being even "* * * more than the normal state authority over public health, welfare and morals." *LaRue,* 93 S.Ct. 395. Thus, the state or any of its municipalities operating under *local option* may determine whether to grant any licenses to sell beer or liquor, sec. 66.054 (5) (c) 1 and sec. 176.38, Wis. Stats.; a municipality may restrict the number of licenses it will authorize, either by ordinance or resolution, *Bjordal v. Town Board* (1939), 230 Wis. 543, 547, 284 N.W. 534; denial may be made of request to transfer license to another area of the municipality, thus increasing police patrol problems, *State ex rel. Edge v. Meyer* (1946), 249 Wis. 154, 23 N.W. 2d 599; a partnership may not be licensed in the name of one partner with the other partner remaining silent or unidentified, *Brill v. Salzwedel* (1940), 235 Wis. 551, 292 N.W. 908, *Sponholz v. Meyer* (1955), 270 Wis. 288, 70 N.W. 2d 619; a license must be refused for premises within 300 feet of a school, hospital or church, sec. 176.05 (9m), Wis. Stats.; state law limits each municipality in the maximum number of licenses to "one license for each 500 population or fraction thereof," sec. 176.05 (21) (b) 1, Wis. Stats.; "A municipality has authority to regulate the operation of taverns in a reasonable manner. This

is implicit in the obligation resting on city authorities to protect the public safety and promote public welfare. The city council is to determine who may be proper persons to operate a tavern, and also the feasibility, with relation to public welfare, of locations in which such business may be carried on * * *". *State ex rel. Higgins v. Racine* (1936), 220 Wis. 107, 264 N.W. 490.

> "* * * It is widely if not universally recognized that intoxicating liquor businesses of all kinds are potentially if not actually dangerous or harmful to the public health, morality and welfare, and that consequently they are subject to strict supervision or prohibition by states and also by municipalities authorized to act in the matter. * * *" 9 McQuillin, *Municipal Corporations*, 483, §26.186.

This court, in *Crowley v. Christensen*, supra, clearly stated the governmental interest, 137 U.S. at 91:

> "* * * By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons

may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. * * *"

To obtain a license for the retail dispensing of fermented malt beverages and intoxicating liquors in the State of Wisconsin, the burden is continuously upon the applicant to show his qualification and to convince the licensing authority of the wisdom of his being licensed from the time he files an application and pays for the printing of the notice in the local paper which notifies the community of his intention to seek licensure by the local licensing body as is required by sec. 176.09, Wis. Stats. Under the scheme of licensing adopted by the State of Wisconsin, the town boards, village boards, and city councils of the various municipalities perform the liquor-licensing function sitting as a legislative body. Sitting as a legislative body, they listen to the opinions and positions of the residents of the community who may be affected by their legislative decisions. In the scheme of things, the people of the State of Wisconsin have decided that this

method of local liquor and beer licensing gives better protection against the evils of the liquor traffic. This principle applies to the cities of Kenosha and Racine as well as to the various towns and villages in the rural and sparsely populated areas of the State of Wisconsin.

The legislative-type hearing provides the municipal officials with an opportunity to consider the objections of anybody in the community to the licensing of a particular person, location, or type of liquor or beer operation. In the instant cases, the only issue was whether the communities involved wanted to license liquor establishments where nude dancing was being and would be performed. In their amended complaints the tavern operators claimed rights to promote nude dancing entertainment under the First and Fourteenth Amendments (A. 10-11). It has never been denied and is included in a stipulation filed prior to the summary judgment determination that the tavern operators featured live entertainment in the form of nude female professional dancers (A. 32). Therefore, there was no issue as to whether or not a complained-of conduct was being carried on by the applicants and, therefore, the question was whether the cities of Kenosha and Racine wanted to continue to license establishments which featured nude entertainment.

Under sec. 176.05 (8), Stats., a licensing body is required to state reasons for the rejection of a renewal application. The three-judge court stated the reason as follows:

> "Subsequent to these hearings, the license committee met and voted to recommend denial of plaintiffs' renewal license applications because of both the nude dancing entertainment provided by the applicants in their taverns and because of the negative effects this form of entertainment allegedly had on the community. * * *" 346 F. Supp. 46.

Can it be denied that there was fair play where the legislative-type hearing was afforded and in the discretion of the licensing body it was decided not to license establishments for the sale of beer and intoxicating liquor where such establishments feature nude dancing? Not to be forgotten is that local legislative bodies are inappropriate to conduct judicial-type hearings for liquor license applicants. First, obviously, many small towns and villages would be ill-equipped to handle such a proceeding without hiring hearing examiners and attorneys to handle the proceeding. Second, in cities where a city attorney could guide the proceeding, the legislative body would be engaging in a "mixing of functions" which has been criticized by many courts as possibly denying due process rights where one person or body is the complainant, prosecutor, judge, and jury. See *Amos Treat & Co. v. Securities and Exchange Commission* (D.C. Cir., 1962), 306 F. 2d 260.

In weighing the relative interests as set out in *Larche* and *Brewer*, it must be concluded that the legislative-type hearing is sufficient to protect whatever "equities" an applicant for a renewal license may have where the action of the licensing body can be reviewed in a judicial proceeding.

This conclusion is inescapable in the instant case because the record clearly indicates that the three bars in the City of Racine and the six bars in the City of Kenosha were denied their licenses because they permitted nude dancing. It is true that both licensing bodies concluded that nude dancing attracted undesirables to the city and caused the city other moral problems, but those issues go to the reasons for not wanting nude dancing, whereas the nude dancing directly supports the discretionary act of refusal to license those establishments. Although not necessary to justify the refusal to license, it is interesting to note that supporting affidavits filed with the motion to modify the

temporary restraining order entered July 2, 1971, certainly support the licensing authorities' conclusions concerning the moral problems created by nude dancing in taverns. (A. 61-72).

In further weighing the private interest against the governmental function, it must be concluded that the minimum requirements for a hearing on the renewal of a liquor license do not require a full judicial-type hearing at the stage of consideration by the city council, village board, or town board.

B. Subsequent court remedies are adequate.

The mere fact that we have contended that a legislative-type hearing before a licensing body of a municipality need not be converted to a quasi-judicial type hearing to comport with due process does not mean that we feel the remedies available to an applicant should end with the licensing body.

If due process requirements can be imposed because of an identifiable protected interest in property, then the judicial inquiry can be postponed within constitutional limitations, as the Wisconsin Supreme Court has provided in *Ruffalo*, 38 Wis. 2d 525, 157 N.W. 2d 571:

> "* * * The reviewing court cannot substitute its judgment for the legal discretion of the Common Council on the merits of the application or review the adequacy of the grounds for its decision other than in the context of determining whether the action of the licensing authority was arbitrary, capricious or discriminatory. * * *"

This court has long recognized: "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability

is adequate. Springer v. United States, 102 U.S. 586, 593, 26 L.Ed. 253; Scottish Union & National Insurance Co. v. Bowland, 196 U.S. 611, 631, 25 S.Ct. 345, 49 L.Ed. 619. * * *" *Phillips v. Commissioner of Internal Revenue* (1931), 283 U.S. 589, 596-597, 51 S.Ct. 608, 75 L.Ed. 1289.

In *Roth,* supra, the court made it clear that where a protected interest is implicated, the right to some kind of a prior hearing is paramount, but that valid governmental interest will justify postponing such a hearing until after the event. To the same effect, *Boddie v. Connecticut* (1971), 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed. 2d 113.

Here, not only is a legislative-type hearing afforded, but adequate legal safeguards are provided by court review. The governmental interest, of course, is the local control of the liquor traffic. The court, in *Lewis v. City of Grand Rapids,* supra, recognized these interests in the importance of local liquor control, 356 F. 2d at 286:

> "* * * The traiditional municipal interests in regulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded, part-time officials, require the use of flexible procedures. * * *"

The judicial remedies developed by court decisions in the State of Wisconsin are more than adequate to protect any identifiable interest, including rights under the due process clause. On review by certiorari the court could remand to the licensing body if factual issues have not been determined by that body. The court can also determine whether errors of law were committed by the licensing board, including due process questions under state and federal constitutions. *State ex rel. Wasilewski v. Bd. School Directors* (1961), 14 Wis. 2d 243, 111 N.W. 2d 198.

In the instant cases, of course, the record is clear that there are no factual issues involved. The complaints in the federal district court allege that the plaintiffs featured nude dancing in their places of business and further allege that the cities denied the licenses because of such conduct which they claim was protected under the First Amendment. (A. 10-11). Accordingly, since there could be no facts at issue in the instant cases, no due process rights were abridged by not providing a judicial-type hearing.

Had the appellees herein felt that the determination of factual issues was at stake, they could have availed themselves of the provisions of sec. 66.054 (14), Wis. Stats., which is a full trial procedure, the same as civil actions instituted in court, which may be instituted "* * * by an applicant, licensee or any citizen of such city, town or village." Although this procedure applies only to the fermented malt beverage license, each appellee was such an applicant, and the determination of the court as to the factual issues surrounding the eligibility of an applicant for a beer license would be binding upon the licensing body in regard to the application for an intoxicating liquor license since the eligibility for licensure under the intoxicating liquor statute is dependent upon the applicant having been issued a fermented malt beverage license.

Although the statute refers to "granting or revocation of any license" it must be construed to include the denial of a license to any applicant. See *Vieau v. Common Council* (1940), 235 Wis. 122, 292 N.W. 297, where an action was brought in county court to review the denial of an operator's license under the predecessor statute, sec. 66.05 (10) (l), 1945 Wis. Stats.; although it was held in *Smith v. Whitewater* (1947), 251 Wis. 306, 29 N.W. 33, that the statute did not apply to the common council's refusal to *transfer* a license.

Finally, in weighing the present Wisconsin scheme for regulation of liquor against an identifiable protected interest of the applicant, it must be remembered that the cost of providing contested hearings at the local town or village level might be so great as to discourage any denials of liquor applicants. Were this to result, a new system of licensing would have to be devised, probably involving the state in every local liquor and beer application. Thus, the local control felt so desirable and which has proved efficient in the control of the liquor traffic would disappear. This appears to be too great a price to pay where no showing has been made that any applicant for a beer or liquor license, either in this case or in any other case, has been denied a license because of the erroneous, arbitrary, capricious, or discriminatory refusals by a licensing body in this state. The Wisconsin scheme does provide for a hearing that is "meaningful," *Armstrong v. Manzo* (1965), 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed. 2d 62, 66, and "appropriate to the nature of the case," *Mullane v. Central Hanover Bank & Trust Co.* (1949), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and *Bell v. Burson* (1971), 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90.

The Wisconsin scheme for the licensing of liquor dealers is not entirely different from the federal government's regulation of alcohol dealers during prohibition. There, on court review of the denial of a renewal permit, the court was limited to determining whether the administrator made his decision "upon error of law, was wholly unsupported by evidence, or was clearly arbitrary or capricious." *Quitt v. Stone* (4th Cir., 1931), 46 F. 2d 405, cert. den. 283 U.S. 839, 51 S.Ct. 487, 75 L.Ed. 1450. See also *Ma-King Products Co. v. Blair* (1926), 271 U.S. 479, 46 S.Ct. 544, 70 L.Ed. 1046; *Silberschein v. United States* (1924), 266 U.S. 221, 45 S.Ct.

69, 69 L.Ed. 256; *Herbert v. Anstine* (4th Cir., 1930), 37 F. 2d 552; *Blair v. Graupner* (3d Cir., 1928), 29 F. 2d 815; *Yudelson v. Andrews* (3d Cir., 1928), 25 F. 2d 80; and *Stein v. Andrews* (3d Cir., 1928), 25 F. 2d 281, 282.

III. The Court Below Should Have Abstained.

The Three-judge Court Act was not designed to be a grant of power to federal judges to arbitrarily interfere with a state regulatory scheme. Rather, the history of the Act clearly establishes that it was passed as a compromise to limit the power of lower federal court judges to interfere with the operation of state statutes. It has been said that it's purpose was to prevent the "improvident statewide doom" by a federal court of a state legislative policy.

As Justice Frankfurter said in *Phillips v. United States* (1941), 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800, at 61 S.Ct. 483:

> "* * * The history of §266 * * * the narrowness of its original scope, the piece-meal explicit amendments which were made to it * * *, the close construction given the section in obedience to Congressional policy * * *, combine to reveal §266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."

As Judge Reynolds has indicated in his opinion of October 21, 1971 (Jurisdictional Statement, A. 106), the temporary restraining order directing the issuance of liquor licenses on June 30, 1971, was issued despite the fact that the plaintiffs had not requested in their pleadings the convening of a three-judge district court or the entering of an interlocutory injunction. Judge Reynolds requested the three-judge

court on his own motion several weeks after he had issued the temporary restraining order directing the municipalities to issue liquor licenses.

It is submitted that this court should determine whether the abstention principles stated in *Burford v. Sun Oil Co.* (1943), 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (Texas oil production control scheme), and *Alabama Public Service Commission v. Southern Railway Company* (1950), 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (Alabama utility regulation scheme), which indicate that a federal court should abstain when its action would interfere with policies having state-wide significance and importance, should not have been applied by the district judge. Abstention is proper in a civil rights case. *Harrison v. N.A.A.C.P.* (1959), 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed. 2d 1152.

In the *Burford*-type abstention the federal court defers to avoid interference with state activities, and dismissal of the action is appropriate.

It would seem that the abstention doctrine should not be blithely ignored by either courts or litigants since an imaginative plaintiff can nearly always find a deprivation of some alleged federal right by virtually every type of state administrative action. It may be seriously doubted if it was ever the intent of Congress to give to the federal courts the responsibility to vindicate *alleged* federal rights to the exclusion of the state courts.

On January 26, 1973, the Court of Appeals for the Fourth Circuit decided in *Lynch v. Snepp,* 41 L.W. 2401, that the principles of comity, equity and federalism preclude a federal district court from enjoining state court action threatening alleged First Amendment rights, applying the *Younger* doctrine. *Younger v. Harris* (1971), 401 U.S. 37, 91

S.Ct. 746, 27 L.Ed. 2d 669. The court reasoned that even though federal courts have the power under the Civil Rights Act to enjoin state proceedings, such power should not be used to upset federalism and centralize power.

The abstention principle is especially applicable to the appellee Go-Go of Racine, Inc., because a civil action involving these issues was pending in the circuit court of Racine County at the time of Judge Reynolds' original exercise of jurisdiction. *Go-Go of Racine, Inc. et al. v. City of Racine et al.*, Racine County Circuit Court No. 71-368-C1 and No. 71-295-C1.

Mr. Justice White in his dissenting opinion in *Lynch v. Household Finance Corp.* (1972), 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed. 2d 424, indicated that *Younger* and companion cases support the view that the federal court's equitable powers should not be used to frustrate or interfere with the operation of state courts by adjudicating federal questions which can be adjudicated in state courts and this principle is applicable where state civil litigation is in progress.

The second cause of action in the amended complaint (as in the original) contended that the plaintiffs had a First Amendment right to feature nude dancing (A. 10-11). The Wisconsin courts have never considered and decided that issue.

The instant case of federal intervention with the policies of the State of Wisconsin in regard to liquor and beer licensing is especially disconcerting when it is considered that the retail liquor establishments in the cities of Racine and Kenosha operated by the appellees herein are actually operating under a license created by a temporary restraining order and later an injunctive judgment of the United States District Court for the Eastern District of Wisconsin. The licenses which hang on the walls in the City of Racine

take the form of a blank application not signed by the city officials but with the federal court order attached thereto and providing the authority for operation.

So far-reaching are the terms of the judgment enjoining the cities of Racine and Kenosha that they may not deny any application for the renewal of a liquor license so long as the Wisconsin Statutes do not provide for a judicial-type hearing before the city council. Thus it must be construed that even if the city council granted a judicial-type hearing, since the statutes have not been changed, no denial could be made, even on justifiable grounds.

Is not the court-ordered granting of liquor licenses and the broad injunctive order blocking denial of any application for a renewal in direct contradiction of sec. 2 of the Twenty-first Amendment to the United States Constitution? If the federal courts can force issuance of a liquor license in violation of a state's laws, can this include the court-ordered issuance of a license where the municipality has reduced the quota? Can the federal court direct the issuance of a renewal liquor license where the municipality has decided to issue only beer licenses?

It would seem that the court should adopt Mr. Justice White's position in *Lynch v. Household Finance Corp.*, supra, that the *Younger* doctrine should bar the federal court's equitable powers from frustrating and interfering with the operation of state courts adjudicating federal questions which can be adjudicated in state courts where, as here, a civil action was pending in the state courts at the time of the exercise of federal jurisdiction and the state scheme for liquor control is under attack.

CONCLUSION

The renewal of a fermented malt beverage and intoxicating liquor license under Wisconsin laws does not involve liberty or property under the due process clause of the Fourteenth Amendment. If any such protected interest can be identified, a legislative-type hearing before a municipal legislative body with subsequent court review is meaningful and appropriate to the nature of the case. The lower court should have abstained where the state liquor control scheme was under attack and the issue of nude dancing in taverns had not been decided by the Wisconsin courts. Therefore, appellants respectfully urge that the judgment of the United States District Court for the Eastern District of Wisconsin be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on February 26, 1973, I duly mailed three copies of the Brief of Appellants to each of the attorneys for the appellees, addressed as follows:

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